Majlis Amanah Rakyat v Ismail bin Maskor & Ors

HIGH COURT (MELAKA) — CIVIL APPEAL NO 1–12–47 OF 2003
LOW HOP BING J
20 DECEMBER 2005

Contract — Guarantee — Personal guarantor — Summons served on defendant's school address and not house address as specified in the guarantee — Whether good service

The second defendant stood as guarantor in favour of the plaintiff ('the guarantee') pursuant to an equipment leasing agreement executed by the plaintiff and the first defendant ('the agreement'). The first defendant defaulted in the repayment. The summons and statement of claim had been served on the second defendant by AR registered post dated 23 March 2002 at Sekolah Menengah Sains Selangor, Jalan Yakop Latif, Bandar Tun Razak, 56000 Kuala Lumpur ('the second defendant's school address') and not his house address. On 4 June 2002, default judgment was entered against the second defendant. This is an appeal by the second defendant against the decision of the learned sessions court judge who had on 29 September 2003 dismissed with costs the second defendant's application to set aside the default judgment.

Held, dismissing the defendant's appeal:

(1) Clause 9 of the guarantee did not use the word 'hendaklah' (shall) or 'mestilah' ('must'), but uses the word 'bolehlah' ('may'), which connotes that service of the summons may be effected on the second defendant at the school address if that indeed is his address, notwithstanding the house address specified in the guarantee (see para 16).

(2) Clause 1 of the guarantee provides for the liability of the second defendant as a principal debtor and not just a guarantor for the payment by the second defendant to the plaintiff of all sums due and owing under the agreement. The second defendant's liability under the guarantee arose at the time when he executed it (see para 33); *Su Chii Leong (sued as a guarantor) v Orix Credit Malaysia Sdn Bhd* [2004] 5 MLJ 308 followed.

(3) Pursuant to the agreement, judgment has been obtained against the first defendant. That judgment continues to be a legally binding and final judgment, in which case a fortiori the second defendant's liability either as a principal debtor or a guarantor remains unassailable (see para 35).

[Bahasa Malaysia summary

Defendan kedua adalah penjamin bagi pihak plaintif ('jaminan tersebut') untuk satu perjanjian penyewaan jentera yang dilaksanakan di antara plaintif dan defendan

pertama ('perjanjian tersebut). Defendan pertama telah gagal membayar balik pinjaman. Saman dan pernyataan tuntutan telah diserahkan kepada defendan kedua melalui surat berdaftar AR bertarikh 23 Mac 2002 di Sekolah Menengah Sains Selangor, Jalan Yakop Latif, Bandar Tun Razak, 56000 Kuala Lumpur ('alamat sekolah defendan kedua') dan bukannya di alamat rumahnya. Pada 4 Jun 2002, penghakiman ingkar dimasukkan terhadap defendan kedua. Ini adalah rayuan oleh defendan kedua terhadap keputusan hakim sesyen yang bijaksana yang telah pada 29 September 2003 menolak dengan kos permohonan defendan kedua untuk mengetepikan penghakiman ingkar.

Diputuskan, menolak rayuan defendan:

(1) Klausa 9 jaminan tersebut tidak memakai perkataan 'hendaklah' (shall) atau 'mestilah' ('must'), tetapi menggunakan perkataan 'bolehlah' ('may'), yang membawa makna penyampaian saman boleh disampaikan kepada defendan kedua di alamat sekolahnya jika benar alamat tersebut adalah alamatnya, walaupun alamat rumahnya dinyatakan di jaminan tersebut (lihat perenggan 16).

(2) Klausa 1 jaminan tersebut menyatakan liabiliti defendan kedua sebagai penghutang utama dan bukan sekadar penjamin terhadap pembayaran oleh defendan kepada plaintif kesemua jumlah yang terhutang dan perlu dibayar di bawah perjanjian tersebut. Liabiliti defendan kedua di bawah jaminan tersebut bangkit pada masa dia menandatanganinya (lihat perenggan 33); *Su Chii Leong (sued as a guarantor) v Orix Credit Malaysia Sdn Bhd* [2004] 5 MLJ 308 diikut.

(3) Berikutan perjanjian tersebut, penghakiman telah dimasukkan terhadap defendan pertama. Penghakiman tersebut terus terikat dan muktamad, di mana ia fortiori terhadap liabiliti defendan kedua, sama ada sebagai penghutang utama atau penjamin tidak dapat disangkal (lihat perenggan 35).]

Notes

For a case on personal guarantor, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 33544.

Cases referred to

Bumiputra Commerce Leasing Sdn Bhd v Siang Cemerlang Sdn Bhd & Ors [2002] MLJU 488 (refd)
MBf Bhd v Tiong Kieng Seng [2001] 4 CLJ 38 (refd)
MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors [1990] 1 MLJ 180 (refd)
PL Construction Sdn Bhd v Abdullah bin Said [1989] 1 MLJ 60 (refd)
Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 3 MLJ 67 (refd)
Soo YAu Cho v Capitalcorp Securities Sdn Bhd [1999] MLJU 648 (refd)
Su Chii Leong (sued as a guarantor) v Orix Credit Malaysia Sdn Bhd [2004] 5 MLJ 308 (folld)
TA Securities Bhd v Ng Yen Ling [2000] 3 MLJ 743 (refd)
Tan Ooi Chee & Anor v Kanching Realty Sdn Bhd [1989] 1 MLJ 519 (refd)

A *United Malayan Banking Corp Bhd v Datuk Sri Chan Swee Ho & Ors* [1978] 1 MLJ 222 (refd)

Yap Teck Ngian v Mobil Oil Malaysia Sdn Bhd [2001] 4 CLJ 127 (refd)

Legislation referred to

B Interpretation Acts 1948 and 1967 s 12

Maria bte Md Yusup (Mazlinda Azlina & Co) for the plaintiff.
Zahiah bte Nasir (Zahiah Normala & Partners) for the first defendant.

C **Low Hop Bing J:**

APPEAL

D **[1]** This is an appeal by Amran bin Maskor the appellant-second defendant ('the second defendant') against the decision of the learned sessions court judge who had on 29 September 2003 dismissed with costs the second defendant's application to set aside the default judgment entered against him on 4 June 2002 ('the default judgment').

E FACTUAL BACKGROUND

[2] Pursuant to an equipment leasing agreement (Al-Ijarah) executed by the plaintiff and the first defendant on 4 April 2000 ('the agreement'), the plaintiff has given the first defendant financial facility in the sum of RM44,000 ('the facility').

F

[3] Under the agreement, the first defendant has to repay the sum of RM50,574.46 in 48 equal monthly instalments of RM1,053.63, commencing 1 July 2000, to be followed by the first day of each subsequent month. However, the first defendant has defaulted in the repayment thereof, amounting to RM13,867.69 as at 16 October 2001 and still continuing.

G

[4] The second defendant who is a government servant in education service has on the same date, ie 4 April 2000 executed a letter of guarantee and indemnity ('the guarantee') in favour of the plaintiff to guarantee and indemnify the plaintiff for the default of the first defendant under the agreement.

H

[5] The first defendant has defaulted in the repayment amounting to RM48,048.07 pursuant to the agreement.

I **[6]** The summons and statement of claim (collectively, 'the summons') had been served on the second defendant by AR registered post dated 23 March 2002 at Sekolah Menengah Sains Selangor, Jalan Yakop Latif, Bandar Tun Razak, 56000 Kuala Lumpur ('the second defendant's school address') and not his house address at 93-2, Kg Rahmat Gedangsa, Hulu Langat, 44020, Kuala Kubu Baru ('the second defendant's house address').

[7] Clause 8 provides that the service of any notice on the second defendant at his address shall be deemed to be served a day after the posting. **A**

[8] The plaintiff has obtained default judgment in the sum of RM48,048.07.

ADDRESS FOR SERVICE **B**

[9] Miss Zahiah bte Nasir, learned counsel for the second defendant, submitted that although the summons had been served on 23 March 2002, the default judgment was irregular as the school address was not the second defendant's address specified in the guarantee, citing in support cl 9 thereof. **C**

[10] Learned counsel Miss Mariah bte Md Yusup asserted for the plaintiff that the school address at which the summons was served is the second defendant's address specified in his affidavit affirmed on 26 June 2003 (encl (6)), relying on *United Malayan Banking Corp Bhd v Datuk Sri Chan Swee Ho & Ors* [1978] 1 MLJ 222 (PC); *TA Securities Bhd v Ng Yen Ling* [2000] 3 MLJ 743 (HC); and *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180 (HC). **D**

[11] I shall deal with this issue by considering the relevant judicial pronouncements which set out the valid service at the address of a defendant. **E**

[12] In *Dato Sri Chan Swee Ho*, service of the writ was effected at his business address as opposed to his place of abode. The first instance judge held that this service was not effective, but on appeal, Chang Min Tat FJ (as he then was) in delivering judgment of the Federal Court held that the writ has been properly served. **F**

[13] In *TA Securities*, cl 23 of the defendant's covenant and undertaking to pay provides that service of any legal process by way of prepaid registered post sent to the defendant's address shall be deemed to have been duly served and duly received by the defendant upon the expiry of three days after the posting was effected. This has been done by the plaintiff. Abdul Aziz J (now JCA) held, inter alia, that the deeming provision of cl 23 meant that the court had to take the service of the writ on the defendant as conclusive. **G**

[14] Where letters of demand had been sent to the respective defendants individually by registered post in accordance with cl 7.06 of the guarantee in *Hasmat Properties Sdn Bhd*, Abdul Malek J (now PCA) held that the letters were validly served. **H**

[15] In this appeal, cl 9 of the guarantee provides that service of any writ or summons or other process of court in respect of any proceedings arising from the guarantee may be effected ('boleh dijalankan') by sending a copy of the writ or summons and statement of claim or other process by prepaid registered post to the address of the parties. **I**

[16] Upon a true construction of cl 9, I am of the view that while service of the summons may be effected on the second defendant at the second defendant's house address stated in the guarantee, that does not preclude the plaintiff from serving it on the second defendant at his school address if that is his address. Clause 9 did not use the word 'hendaklah' (shall) or 'mestilah' ('must'), but uses the word 'bolehlah' ('may'), which connotes that service of the summons may be effected on the second defendant at the school address if that indeed is his address, notwithstanding the house address specified in the guarantee.

[17] In this regard, it is significant to note that pursuant to para 6 of the second defendant's affidavit affirmed on 26 June 2003, he has exhibited his solicitors' letter dated 11 March 2003 which expressly stated the school address as the second defendant's address. In the circumstances, I am unable to accept the contention that service of the summons at the second defendant's school address was not valid service under cl 9.

SIGNATURE ON AR CARD

[18] It was argued for the second defendant that the signature on the AR card dated 27 March 2002 was not that of the second defendant.

[19] In response, the plaintiffs contention is that the summons has been duly served, on the authority of *Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67 (HC).

[20] As regards this issue, I find a strikingly similar situation in *Pengkalen Concrete Sdn Bhd*, where the writ of summons was served on the defendants' correct address, but the AR card was acknowledged by one 'Yanti' which was not any of the defendants' names. Suriyadi J held, inter alia, that:

(1) the fact that the recipient was 'Yanti' did not vitiate the service because postal service of a writ does not require that the person named in the writ must be the very same person who received it; and

(2) under s 12 of the Interpretation Acts 1948 and 1967, where a written law authorises postal service, then unless the contrary was proved, service shall be presumed to have been effected at the time when the letter (in this case, I would add, includes a writ) would have been delivered, in the ordinary course of the post.

[21] I agree with the views of the learned judge and apply them to the facts before me and hold that the summons sent by AR registered post to the second defendant at his school address is deemed to be effective service as the second defendant has failed to rebut the presumption.

RETURN DATE

[22] It was stressed for the second defendant that the return date of the summons was 2 April 2002 but the AR card was dated 27 March 2002, which was less than 14 days from the date of service and the second defendant was unaware of the new mention date, ie 4 June 2002.

[23] The plaintiffs stand is that in addition to the service on 23 March 2002, it has vide letter dated 28 May 2002 in encl (11) exh ASMS notified the second defendant of the new mention date, ie 4 June 2002. *Soo YAu Cho v Capitalcorp Securities Sdn Bhd* [1999] MLJU 648 (HC) was cited.

[24] In relation to this issue, I find from the affidavits filed herein that the plaintiff has sent both the letters viz 23 March 2002 and 28 May 2002 by AR registered post to the second defendant's school address, informing him of the mention date and requesting him to attend court on 2 April 2002 (Tuesday) 9am, and subsequently on 4 June 2002, failing which default judgment would be obtained against him. The plaintiff did not obtain any judgment against the first defendant on 2 April 2002 which was the first return date.

[25] It is not disputed that after a lapse of two months and two days from the first mention date the second defendant still did not attend court on 4 June 2002 which was the second return date. The inevitable consequence is that the plaintiff had obtained default judgment against the second defendant.

[26] Almost identical facts were unfolded in *Soo Yau Cho*, where the summons was served on the defendant by way of AR registered post with a letter dated 25 February 1997 on which no judgment was obtained against the defendant. The plaintiffs solicitors through a letter dated 19 March 1997 informed the defendant of the new mention date. The defendant failed to appear and default judgment was obtained against him. Faiza Tamby Chik J (as he then was) held that the judgment was regular.

[27] In this appeal, on the facts and the law, I am unable to identify any irregularity in the default judgment.

DEFENCE ON MERITS

[28] It was submitted that there are merits in the second defendant's defence and that a draft statement of defence has been annexed to his affidavit. He relied on *Pengkalen Concrete Sdn Bhd* and *MBf Bhd v Tiong Kieng Seng* [2001] 4 CLJ 38 (HC); and *Yap Teck Ngian v Mobil Oil Malaysia Sdn Bhd* [2001] 4 CLJ 127 (HC).

[29] The plaintiff stressed that the second defendant's liability is not only as a guarantor but a principal debtor and so there is no merit in his defence. Reference was made to *Su Chii Leong (sued as a guarantor) v Orix Credit Malaysia Sdn Bhd* [2004] 5 MLJ 308 (HC); and *Bumiputra Commerce Leasing Sdn Bhd v Siang Cemerlang Sdn Bhd & Ors* [2002] MLJU 488.

[30] In my judgment, it would serve a useful purpose to enumerate the relevant principles governing the setting aside of a regular judgment as follows:

(1) Before setting aside a default judgment, the court must be satisfied on the affidavits that there is defence on the merits: see eg *Tan Ooi Chee & Anor v Kanching Realty Sdn Bhd* [1989] 1 MLJ 519; *Pengkalen Concrete Sdn Bhd*; *Tiong Kieng Seng*; and *Yap Teck Ngian*;

(2) The defendant has to establish the defence on the merits by at least filing a draft defence for the court to consider: see eg *Pengkalen Concrete Sdn Bhd*; and

(3) A defence on the merits means a defence which discloses an arguable or triable issue, although it does not have to show that there is a real prospect of success or that it has to carry some degree of conviction: see eg *Tan Chiang Brother's Marble (S) Ptd Ltd v Lightweight Concrete Sdn Bhd* [1997] 4 CLJ 759 (HC); *Pengkalen Concrete Sdn Bhd*; and *PL Construction Sdn Bhd v Abdullah bin Said* [1989] 1 MLJ 60.

[31] The second defendant has exhibited his draft statement of defence wherein he admitted in para 5 that he had executed the guarantee. However, his draft defence denied:

(1) the applicability to him of the terms of the agreement and the guarantee (paras 3 and 5);

(2) the facilities granted to the first defendant (para 2);

(3) the default by the first defendant (para 4); and

(4) the plaintiffs right to claim against him as guarantor (para 6);

[32] The above denials by the second defendant must be tested against the plaintiffs case, in particular the judgment obtained by the plaintiff against the first defendant who has not appealed against it nor applied to set it aside. In the circumstances, I am of the view that the second defendant's aforesaid denials are untenable.

[33] Having admitted the execution of the guarantor, the second defendant is bound by the terms thereof. The guarantee was executed by the second defendant in consideration of the plaintiff agreeing to approve and grant the facilities to the first defendant pursuant to the agreement. Clause 1 provides for the liability of the second defendant as a principal debtor and not just a guarantor for the payment by the second defendant to the plaintiff of all sums due and owing under the agreement. The second defendant's liability under the guarantee arose at the time when he executed it (see para 17 at p 314 in *Su Chii Leong* per Clement Skinner J).

[34] It has been stated by Su Giok Yiam JC (now J) in *Bumiputra Commerce Leasing Sdn Bhd* that where the defendants' liability under the guarantor was not merely as guarantors but as principal debtors, the defendants were liable even though a notice of demand had not been sent to the borrower first.

[35] The facts before me are even more detrimental to the second defendant, as pursuant to the agreement, judgment has been obtained against the first defendant. That judgment continues to be a legally binding and final judgment, in which case

a fortiori the second defendant's liability either as a principal debtor or a guarantor remains unassailable. I am therefore unable to find any triable or arguable issue in his defence which clearly has demonstrated no merits.

CONCLUSION

[36] By reason of the foregoing grounds, I hold that the decision of the court below is correct which I hereby affirm. Consequently, the second defendant's appeal is dismissed with costs.

Defendant's appeal dismissed.

Reported by Sally Kee